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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 v.

15 Cr. 867 (RMB)

5 REZA ZARRAB,

6 Defendant.

7 -----x
8 New York, N.Y.
9 December 14, 2016
9:39 a.m.

10 Before:

11 HON. RICHARD M. BERMAN,

12 District Judge

13 APPEARANCES

14 PREET BHARARA

United States Attorney for the
Southern District of New York

15 BY: MICHAEL LOCKARD

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APPEARANCES CONTINUED

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- also present -

Special Agent Jennifer McReynolds, FBI

Asiye Kay, Turkish Language Interpreter

George Esayan, Turkish Language Interpreter

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1 THE COURT: So this is a continuation of the Curcio
2 hearing which we started I believe it was on or about
3 November 30. Let me just see if I understand where things are
4 and talk about the possible agenda for today.

5 First, let me just ask Mr. Zarrab if he is able to
6 understand these proceedings with the help of the Turkish
7 language interpreter?

8 THE DEFENDANT: Yes.

9 THE COURT: So a couple of items of business. We have
10 applications from two of Mr. Zarrab's New York counsel to step
11 out of the case, and I just want to hear briefly about that.
12 Ms. Chung, among you, and also --

13 MS. CHUNG: Your Honor, Mr. Kleinfeld isn't here
14 today.

15 THE COURT: Mr. Kleinfeld is not here today.

16 MS. CHUNG: He has never attended any court
17 conferences, but I am prepared to speak on our application.

18 THE COURT: So, yes, would you just explain what's
19 going on from your perspective, and in particular I would like
20 you to address the issue about whether anything as a result of
21 your representation that is impacted by this Curcio hearing or
22 impacts the Curcio hearing, any conflicts from your firm or
23 yourself that we ought to know about.

24 MS. CHUNG: No, your Honor. There is no conflict
25 issue with either of the firms that are seeking to withdraw.

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1 It's been a decision by Mr. Zarrab in preparing for trial and
2 for deciding on the composition of his trial team that he will
3 no longer retain the Quinn Emanuel or Clifford Chance firms,
4 and for that reason we have made our application to withdraw.

5 And the Curcio -- maybe the connection is that as your
6 Honor is considering retention issues and counsel issues, we
7 wanted your Honor to be aware of what Mr. Zarrab's plans were.

8 THE COURT: What Mr.?

9 MS. CHUNG: Zarrab's plans were, obviously subject to
10 the approval of the Court, but we thought it important to let
11 the Court know what Mr. Zarrab's intentions would be, subject
12 to the Court's approval.

13 THE COURT: And, Mr. Zarrab, is that right, that you
14 wish Mr. Kleinfeld's firm and Ms. Chung's firm to step out of
15 the case at this point?

16 THE DEFENDANT: Yes, your Honor.

17 THE COURT: OK. And at the same time, though, we have
18 new counsel, Mr. Ferrari, I believe, who has filed a pro hac
19 motion to be admitted.

20 Mr. Ferrari, tell us a little bit about yourself. You
21 have a distinguished background and you work mostly I think
22 from out of Washington; is that correct?

23 MR. FERRARI: That's correct, your Honor. And as
24 Ms. Chung alluded to, as part of the streamlining for the
25 trial, I have handled a number of IEEPA-related prosecutions on

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1 the defense side, and I would be assisting the defense team as
2 we move towards trial.

3 THE COURT: I guess streamlining means two leave, one
4 comes in, so net one leave. Is that the streamlining that we
5 are talking about?

6 MR. FERRARI: I believe so, your Honor. Yes.

7 THE COURT: You are very welcome --

8 MR. FERRARI: Thank you, your Honor.

9 THE COURT: -- to be here.

10 So let's also just talk for a moment about the --
11 Mr. Dinh, probably this is your issue, or the waivers that I
12 had requested from the various banks, could you just bring us
13 up to speed as to how many banks? Is it eight, or whatever the
14 number is, that your firm represents who are also alleged to be
15 participant banks in the transactions involved in this case?

16 MR. DINH: Yes, your Honor. It is a total of eight.
17 Your Honor is correct in that regard.

18 And with respect to the progress of those eight, six
19 we have obtained waivers for. One, Citibank, has indicated
20 they will not sign a consent of waiver, and we are still
21 working with the eighth bank, Wells Fargo.

22 After the Court's order last Friday, we sought from
23 the three banks that have not addressed their letter directly
24 to the Court, we gave the Court's instruction and requested
25 that they further advise the Court that it may rely on the

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1 waiver and representations therein. We have heard back, as you
2 saw, overnight, we filed this morning, from one of those banks,
3 Standard Chartered. The other two banks, JPMorgan Chase and
4 UBS, are still considering the request. They have acknowledged
5 our request and very respectfully acknowledge the Court's
6 request. It is just that this is not a standard matter for
7 them in terms of doing something of that type of representation
8 so they are working through their processes.

9 THE COURT: OK. I appreciate that. And I did see and
10 review all of those waivers.

11 And I'll turn in a moment to Mr. Gillers' opinion,
12 which has been forwarded to me. Among other things, he is of
13 the opinion that the waivers are not even necessary from the
14 banks' point of view. If I understand his argument correctly,
15 it's that the banks presumably are not disadvantaged by the
16 representation of them and Mr. Zarrab, it's Mr. Zarrab who is
17 potentially disadvantaged, and so the waiver more properly
18 comes from him.

19 MR. DINH: That is exactly right, your Honor.

20 And I point your Honor's attention to the middle of
21 page 3 of Professor Giller's opinion where he says that the --
22 while I appreciate the Court's care in seeking consent from the
23 banks, there is nothing for which Kirkland requires their
24 consent. They are waiving no duties Kirkland owes them.

25 I think your Honor has correctly stated that the focus

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1 of the Curcio proceeding before your Honor is to apprise
2 Mr. Zarrab of the limitations on our ability to represent
3 Mr. Zarrab given our obligations not to be adverse to the bank.
4 And I think the Curcio questions that the government has
5 presented, we have agreed to and we have added to, at the
6 recommendation of Professor Gillers, correctly states those
7 points.

8 May I add, your Honor, that the only really contrary
9 authority that the government has cited with respect to the
10 professional obligation occurred in Footnote 1 of the original
11 Curcio letter that the government submitted on November 18th,
12 and that Footnote 1 states that New York Disciplinary Rule
13 5-105 requires that all clients that are subject to conflicts
14 waive the conflict in writing. I would like to advise the
15 Court that that rule has been superseded in New York by Rule
16 1.7 since April 1, 2009, and so, therefore, Professor Gillers'
17 analysis of the relevant law, the Rule 1.7, is the controlling
18 analysis.

19 THE COURT: Great. I appreciate the point, and I just
20 make one observation. So sometimes judges and lawyers and even
21 law professors have somewhat different fish to fry, as they
22 say. So I am eager to follow up, maybe it is belt and
23 suspenders, but to make sure we have those waivers on behalf of
24 the banks as well.

25 MR. DINH: Yes, your Honor. We will submit any

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1 communications to the bank as we are able to obtain.

2 But I think the issues, all the issues are fully
3 joined before the Court because Citibank has indicated to us
4 that it will not consent to waive, so I do not think that they
5 will reconsider their position in that regard.

6 THE COURT: OK. So then let's turn to Mr. Gillers' --
7 Professor Gillers, oh, by the way, who is regarded as clearly
8 expert in these matters, so you couldn't have a better person
9 to write an opinion. There is nevertheless one issue that I
10 would like to explore further. It relates to his opinion and
11 it also relates to the conflicts issue.

12 Oh, let me just ask for a moment. The government
13 obviously saw Mr. Gillers and read Mr. Gillers' opinion, right?

14 MR. LOCKARD: We did. We received it last night when
15 it was filed on ECF.

16 THE COURT: Right. And have you formed an opinion
17 about that opinion, so to speak? Do you agree with it, or do
18 you have questions related to it, or are you seeking your own
19 counsel with respect to these issues?

20 MR. LOCKARD: So we are not currently seeking outside
21 opinions about this issue. I think we do have certainly some
22 thoughts about --

23 THE COURT: Hold on a second. If you could use the
24 podium, Mr. Lockard.

25 MR. LOCKARD: I think we do have certainly some

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1 thoughts about even on the quick review we have been able to
2 accomplish since the opinion was filed last night. And I am
3 happy to sort of speak to all of the issues that the government
4 has been considering in connection with these Curcio
5 proceedings, or if the Court would rather sort of take them
6 issue --

7 THE COURT: I will come back to that.

8 I just wondered if you were in a hundred percent
9 agreement with it, it would be one thing, but if you are less
10 than that, I think we'll come back to other issues.

11 MR. LOCKARD: Yes, your Honor.

12 THE COURT: How would you characterize where you are?

13 MR. LOCKARD: I think, significantly, there are two
14 issues that I think the government disagrees with respect to
15 Mr. Gillers' opinion, or at least the characterization of that
16 opinion. The first is, you know, again, the government does
17 believe that in the context of this prosecution there is
18 adversity between Mr. Zarrah and between the victim banks.

19 THE COURT: OK. That is one. We'll come back to
20 that. Was there another one?

21 MR. LOCKARD: We do believe that under -- you know,
22 granted, the New York rules have shifted from the previous
23 version to the current rules, but the current rules still do
24 require, under Rule 1.7(b)(4), that each affected client give
25 informed consent, confirmed in writing.

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1 THE COURT: OK. So you support the waiver process, as
2 it were?

3 MR. LOCKARD: It appears to be required by the rule.

4 THE COURT: OK. All right. We'll come back and hear
5 from you and from Mr. Dinh in a minute. But here's the one
6 issue -- thank you. Oh, and we have Mr. Rimm.

7 Again, I should mention, Mr. Rimm, you were appointed
8 by me as outside independent counsel for purposes of this
9 Curcio proceeding of Mr. Zarrab, and I think you indicated to
10 me in a letter recently that you have had I believe an updated
11 meeting with Mr. Zarrab with respect to the issues here?

12 MR. RIMM: Mr. Zarrab and I met yesterday morning.
13 The focus of yesterday's meeting was on the six additional
14 banks, and my letter from yesterday early afternoon addresses
15 each of those six banks.

16 I should just note for the record that I spent some
17 time with Mr. Zarrab this morning discussing with him the three
18 additional filings, of which I am aware, that were filed after
19 my meeting with him from yesterday morning. That would be,
20 number one, the Kirkland and Ellis letter from yesterday
21 attached to which was the Gillers opinion. Mr. Zarrab and I
22 focused on the two additional questions that were proposed to
23 be included in the Curcio colloquy.

24 THE COURT: Proposed by Professor Gillers?

25 MR. RIMM: Right.

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1 We also discussed the December 13th letter from
2 Kirkland & Ellis updating the Court as to the status with
3 respect to the Court's request for the letters to be either
4 readdressed or for supplemental letters to be submitted. And
5 we also spoke about Kirkland & Ellis' December 14th letter from
6 this morning attached to which was a supplemental submission
7 from Standard Chartered Bank.

8 THE COURT: OK. So here's the issue that I want to
9 delve into in a little bit more detail, and it may turn out
10 that it is a nonissue in relation to this Curcio and it is just
11 a question of my own interest and fascination or maybe there is
12 some more to it than that. So that has to do with the bank,
13 the HSBC Bank situation, and here is the following. So at the
14 current moment both you and Mr. Clement and one of your other
15 partners, all of whom have argued in this court on behalf of
16 Mr. Zarab -- Right? -- are actually at the very moment arguing
17 what turns out to be a very similar sanctions case in the
18 Second Circuit Court of Appeals on behalf of HSBC. So the
19 issues have been narrowed substantially in terms of the appeal
20 and what is being argued. But that underlying case,
21 interesting, stems from an information that was a criminal
22 information that was filed in the Eastern District of New York
23 in 2012 by the government against HSBC Bank U.S., U.S.A. and
24 Holdings. And, in fact, I must say I was intrigued and I don't
25 know what the implications there are necessarily for us here,

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1 but when I say it is a similar sanctions case, HSBC Bank was
2 actually accused by the government of, just for a summary, of
3 not having the structures in place as a bank -- the safeguards,
4 the methods, the process, the oversight -- and even more than
5 that, actually, they were accused of willfully violating, among
6 other things, the very same sanctions law that Mr. Zarrab is
7 accused of violating in this case going back to 2012.

8 So the questions that I have -- and, again, maybe they
9 are just questions that are just because it is so interesting,
10 but -- well, let me just, before I get to that: So what
11 happened in that case is that there was no prosecution
12 ultimately in the sense that the government agreed to enter
13 into what's called a deferred prosecution agreement with the
14 banks in that case, but along with that the banks, if I
15 remember correctly, forfeited over a billion dollars. That was
16 number one. Number two, they set up a five-year monitorship,
17 or whatever, during which time they agreed -- and that period
18 is ongoing, they are still in the monitorship. And the monitor
19 is a respected attorney, Michael Cherkasky, who many of us are
20 familiar with, and they agreed to implement a whole series of
21 measures to make sure that those violations of the sanctions
22 law could not, would not recur.

23 So this regime is a dramatic, for want of a better
24 phrase, know-your-customer series of requirements and
25 responsibilities, which the banks agreed to implement and,

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1 hence, they got the deferred prosecution agreement.

2 So here's some of the questions that I have about
3 that, and I don't know if it impacts this legally, the Curcio.
4 It certainly does -- it certainly is interesting, or ironic, or
5 whatever.

6 So probably the implications are that the wall -- the
7 ethical wall that Kirkland was proposing, you all were
8 proposing, between the lawyers who work on the bank cases and
9 the lawyers who work on Mr. Zarrab's case doesn't exist with
10 regard to HSBC because in fact there you are representing that
11 very bank and Mr. Zarrab, now do and will.

12 So here are some of the questions I have. So this one
13 is for the government or for you. So are some or more of the
14 transactions that Mr. Zarrab is accused of entering into which
15 the government says are illegal, did some or more of those
16 involve HSBC? We know "yes" is the answer to that, but part B
17 is did some of them involve HSBC even after this monitorship
18 was set up and entered into? If the government knows?

19 MR. LOCKARD: It's hard to say for certain because the
20 investigation relating to HSBC was conducted by a different
21 U.S. Attorney's Office and a different investigating agency or
22 agencies, but it does appear that that is certainly a
23 possibility given the overlap in the timeframe of the
24 monitorship and the timeframe of the charges in the Indictment
25 and the fact that HSBC is such a major player in U.S. dollar

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1 corresponding account business. There is certainly a likely
2 possibility.

3 THE COURT: It struck me as that also, also as a
4 possibility, as someone who is even further removed from the
5 nitty-gritty details and facts of the case, just looking at the
6 dates and looking at the players. So that's one question I
7 had. All right. And if that would matter in any way.

8 MR. BRAFMAN: Your Honor -- excuse me, sir. Benjamin
9 Brafman for Mr. Zarrab.

10 Just so it's clear, the defense maintains that if
11 there were any such transactions by HSBC, they were with
12 companies which, although charged in the Indictment, they
13 maintain they are completely unrelated to Mr. Zarrab
14 personally. So I don't know whether that alters the issue at
15 all but that's --

16 THE COURT: So say that again. Explain that. There
17 could be other defendants or --

18 MR. BRAFMAN: There are a number of entities charged
19 in the Indictment which the government suggests are related to
20 Reza Zarrab that we maintain or had maintained that he does not
21 own or have any ownership interest in those companies. And I
22 believe if there is a transaction involving HSBC and some of
23 the companies charged in the Indictment, I just want the record
24 to reflect that we maintain that Reza Zarrab is not the owner
25 of those companies. I don't know if that alters your Honor's

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1 inquiry but I just want to make certain --

2 THE COURT: No, that is very helpful.

3 MR. BRAFMAN: That we are not conceding anything.

4 THE COURT: No. I get that. Thanks.

5 So one obvious question is does the fleshing out of
6 this -- well, did you feel or do you feel that there was any
7 need or did you talk to Mr. Cherkasky or anybody about that,
8 the monitorship, in connection -- only as it relates to this
9 Curcio proceeding?

10 MR. DINH: Yes, your Honor, thank you very much for
11 that inquiry because it is one that we take very seriously.

12 Your Honor is entirely correct in your recitation of
13 the case in the Eastern District. I would only start by
14 providing the context that we, the Kirkland & Ellis lawyers,
15 were not representing HSBC with respect to the underlying
16 information, with respect to the deferred prosecution
17 agreement, or even with respect to the interactions with the
18 monitor as part of that compliance. We were retained for the
19 limited purpose of reviewing and then ultimately prosecuting an
20 appeal, alongside with the government, of a District Court
21 order unsealing and making public Mr. Cherkasky's report to the
22 government. So it was that narrow of a representation, not
23 what is underlying the entire matter.

24 THE COURT: Got you. So, this question: Is that the
25 what the Gillers' opinion -- well, I don't know what he knows

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1 or looked into or if he was aware of the monitorship and all of
2 that, but is the thrust of his opinion that let's assume those
3 facts are the facts that for purposes of a Curcio proceeding
4 you can separate the issues out so that if the appeal issues --
5 and this appeal relates to the publication of some documents,
6 or not -- if that's unrelated to the Information, etc., then
7 that means that there is no conflict? Can lawyers splice or
8 dice the issues of one case, one transaction, and
9 notwithstanding the underlying case, here the information
10 charging the bank, but say it's OK to represent somebody for
11 the narrow issue on appeal as long as that issue is -- well, I
12 don't know about "as long as" -- even though there is a set of
13 facts underlying that case that might pose some question?

14 MR. DINH: Yes, I think your Honor posed exactly the
15 question that we were concerned with and asked Professor
16 Gillers to focus on specifically. He addressed that at page 4,
17 specifically Footnote 3 of the Information, that we had wholly
18 apprised him of. And the basic inquiry is fairly
19 straightforward, as one should divide the duty to the duty of
20 loyalty and the duty of confidentiality. We owe both to both
21 clients, HSBC, as well as to Mr. Zarrab.

22 With respect to the duty of loyalty, there is no
23 direct adversity because we do not represent HSBC in this
24 proceeding. It is a separate proceeding. And we owe HSBC that
25 duty of loyalty notwithstanding our representation of

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1 Mr. Zarrab in this case.

2 The Curcio hearing that your Honor is conducting
3 ensures that the defendant is fully apprised of the limitation
4 on our ability to represent him fully because of our
5 preexisting obligation to HSBC. And so that's why under
6 Professor Gillers learned opinion and our position, our
7 representation of Mr. Zarrab is of limited scope; that is,
8 everything except that is dealing with the bank and may be
9 potentially adverse to the bank. And that's why the questions
10 in the Curcio proceeding, after it was done and originally
11 proposed and as we originally acceded to, ask Mr. Zarrab
12 whether he understands that and whether he knowingly and
13 intelligently waived that right of Kirkland to represent him
14 entirely, not just for the limited purpose of the issue of not
15 dealing with the case.

16 THE COURT: I get it.

17 MR. DINH: With respect to the duty of
18 confidentiality, as your Honor indicated, our prophylaxis, the
19 wall, does not work as a prophylaxis because Mr. Clement,
20 myself and another lawyer are on both sides of the wall. It is
21 conceivable that some information from Mr. Zarrab's case may be
22 relevant to the HSBC case, and it is conceivable, and although
23 these are all within the realm of conceivability rather than a
24 possibility, but highly conceivable that some information on
25 the HSBC case may be relevant to Mr. Zarrab's case. We owe

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1 that duty of confidentiality both under Rule 1.6(b) and 1.8(b),
2 independent of any wall that we would have dealt with and
3 worked through as a prophylaxis. That is why we have advised
4 Mr. Zarrab that we will not use any information that HSBC may
5 have in aid of -- or what we may learn in the course of
6 representing HSBC in aid of his representation, and, indeed, we
7 can't because we are limited in our representation of
8 Mr. Zarrab. So, therefore, there is no adversity in that
9 regard.

10 Likewise, our agreement with HSBC fully ensures that
11 we protect any information that conceivably could be used here
12 in order to represent Mr. Zarrab. Again, it is a mere
13 impossibility because we have limited the scope of our
14 representation of Mr. Zarrab to those issues not dealing with
15 the banks, and so therefore we have eliminated the possibility
16 that such information would be used and our confidentiality
17 would be violated.

18 We have further established procedures that is in the
19 now nearly impossible and highly unlikely, I would say well not
20 impossible but conceivably, that a Kirkland and Ellis pleading
21 would mention HSBC, consistent with our duties to Mr. Zarrab,
22 we would give HSBC an opportunity to review that so that they
23 could make their own judgment that there is no confidential
24 information that has been improperly used. So I think that we
25 have established procedures both structural, by limiting the

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1 scope of our representation of Mr. Zarrab, and also procedural
2 in order to ensure that there is no breaching of the duty of
3 confidentiality, either way.

4 Your Honor mentioned the question of adversity as well
5 as the viability of waiver with respect to the banks. The key
6 part here that -- I think the key part of the analysis that
7 Professor Gillers presents, as well as in our opposition, is
8 that there is no adversity because we do not represent HSBC in
9 this proceeding, and so -- and we have indeed walled off,
10 limited, if you will, our representation of Mr. Zarrab so that
11 we would not be taking a position adverse to the banks.
12 Indeed, we would not be dealing with any of the -- effectively,
13 we would not be dealing with any of the bank propositions
14 because the banks potentially are affected by that case. And
15 so in that sense we are not adverse and cannot be adverse.

16 So the only question is the Curcio proceeding for
17 Mr. Zarrab, whether he understands the limitation on Kirkland &
18 Ellis' ability to represent him fully, and then whether or not
19 that limitation is reasonable to give him an effective defense.
20 With respect to the first, the Curcio questions aptly
21 addresses. And with respect to the second, the fact that we
22 have able counsel representing Mr. Zarrab in all aspects of the
23 proceeding more than amply provides the Court with the comfort
24 that he would be adequately represented notwithstanding the
25 limitation on Kirkland & Ellis' ability to fully represent him.

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1 And so, therefore -- and this is where the difference
2 between the former rule, 505-105, and Rule 1.7(b)(4) is
3 relevant, because the prior rule requires written consent by
4 both clients when there is a concurrent representation. The
5 new rule, the formulation is "affected" clients. So the
6 insertion of the word "affected," I submit, permits and
7 validates and codifies the position that we and Professor
8 Gillers have articulated here, which is the banks are not
9 affected because of the sufficient, adequate and complete
10 limitation on our ability to represent Mr. Zarrab to the extent
11 that it potentially affects the banks' interests.

12 THE COURT: So here is a hypothetical question. Is
13 the analysis different if, for example, the appeal that you are
14 arguing, or will be arguing, in the Second Circuit went to the
15 merits of the deferred prosecution arrangement, as opposed to
16 this issue of whether a particular document ought to be public
17 or not?

18 MR. DINH: No, your Honor, it would not be, simply
19 because, again, our representation of Mr. Zarrab will be
20 limited to matters other than the bank fraud issues, and so,
21 therefore, there is no adversity --

22 THE COURT: Say that again. Your representation of
23 Mr. Zarrab would be --

24 MR. DINH: Limited to issues other than the bank fraud
25 charges.

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1 THE COURT: Which bank fraud charges? In this case?

2 MR. DINH: In this case, your Honor, yes.

3 THE COURT: Didn't Mr. Clement already argue the bank
4 fraud charges in this case on the motion to dismiss?

5 MR. DINH: He did, your Honor, at a time when the
6 potential conflict was not identified because HSBC was not
7 named in this case, and we were notified that there would be a
8 potential conflict in that regard. And so as soon as we
9 learned of the conflict and as part of the Curcio proceeding
10 here, we advised Mr. Zarrab of the potential issues and advised
11 him that he has the right not to consent as part of the Curcio
12 processes.

13 THE COURT: OK.

14 THE CLERK: Mr. Lockard, if you could use the podium,
15 please.

16 MR. LOCKARD: Your Honor, I think the HSBC issue
17 highlights how fully and complex of an issue is presented with
18 respect to the Curcio issues in this particular case.

19 Just to take a step back, as a background principle,
20 the Court has a couple of obligations and a couple of
21 responsibilities here. The first is to ensure --

22 THE COURT: Wait. Before you leave -- so I don't mean
23 to cut you off, but are you heading in the direction of
24 contending that Kirkland & Ellis cannot participate in this
25 case?

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1 MR. LOCKARD: What we're contending for now --

2 THE COURT: Or is it so leaning?

3 MR. LOCKARD: No, we are not taking that position at
4 this point. We are taking the position that in order for the
5 Court to effectively exercise the broad discretion that it does
6 have in addressing and resolving issues presented by conflicts
7 of interest, that judgment has to be informed judgment. So the
8 facts matter, and it's important to the government to ensure
9 that the Court has as robust of a factual record in front of it
10 in order to be able to exercise its discretion appropriately.

11 The factual issues relating to the HSBC issue we think
12 are particularly thorny. I disagree with Mr. Dinh when he says
13 that there is not adversity here between Mr. Zarrah and the
14 banks, as the government has repeatedly said. The government
15 contends that the banks are victims of a bank fraud. So while
16 the banks are not technically parties, because they can't be in
17 a criminal prosecution, they are nonetheless involved in this
18 matter as witnesses and as victims. If they are victims, they
19 have certain rights under the Criminal Code, including rights
20 to notice, rights to participate in certain aspects of the
21 proceedings, and potentially rights to restitution for any
22 losses that they may have suffered.

23 The defendant in this case has already taken the
24 position that the banks are not victims, which is a position
25 that is adverse to the banks' rights as victims. So we think

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1 there already has been adversity between Mr. Zarrab and the
2 banks in this matter.

3 When it comes to the HSBC matter, we had an extensive
4 discussion between the Court and the government and defense
5 counsel about potential trial arguments or trial defenses
6 relating to the banks. And Mr. Zarrab made it clear that one
7 potential argument that he was not going to waive and that may
8 very well come --

9 THE COURT: Not going to waive?

10 MR. LOCKARD: And could very well come up at the trial
11 would be a contention with respect to either the bank fraud
12 charge or the IEEPA charge or who knows which charge, that the
13 banks either were indifferent to the conduct that he was
14 engaging in and did not view the nexus to Iran as material or
15 were somehow complicit, and that is an argument that he has
16 maintained in his quiver of available arguments.

17 The representation of HSBC undoubtedly puts the
18 Kirkland firm in possession of material confidential
19 information that relates to that issue. It is not a
20 possibility, it is not a hypothetical, it is a certainty that
21 Kirkland possesses confidential information about HSBC that is
22 relevant to a potential defense that we've already discussed on
23 the record at the prior conference.

24 So when Mr. Dinh proposes that the firm is not
25 actually going to be adverse to HSBC, what we're pointing to

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1 are a bunch of conditions that have been placed on HSBC's
2 waiver of the conflict. And I take it that the idea is that
3 these conditions effectively handcuff the firm from doing
4 anything that could be adverse to HSBC's interests and,
5 therefore, there is no longer any conflict with respect to
6 HSBC. If that is in fact the contention that the Court is
7 being asked to rely on, then we think it is important for the
8 Court to be able to assess whether that contention is in fact
9 true and to be able to assess whether those conditions create
10 circumstances that might make it unreasonable for a defendant
11 to agree to those conditions. That is the Court's function
12 that it has to be able to exercise based on an appropriate
13 factual record.

14 The conditions that have been placed on the HSBC
15 waiver include a pretty unusual condition that could give HSBC
16 advance access to pleadings in this case before they are filed,
17 to review those pleadings before they are made to the Court or
18 to the government. So what's being proposed is that the
19 defendant is going to agree that the alleged victim of his
20 crimes could have an opportunity to review the arguments his
21 lawyers are going to make on his behalf before they're filed.
22 We think that is a pretty complicated issue to address from a
23 conflicts perspective and from a Curcio perspective.

24 It's also been proposed that the firm's role in this
25 case is going to be so limited that it is no longer going to

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1 deal with the banks. It's not clear exactly where that is
2 memorialized or how that is formalized, but it is also not
3 clear to the government at this point what the scope of that
4 limitation is. Given the fact that the bank involvement is so
5 central to the charges in this case, it's hard to see what is
6 left if you take the banks out of it, because the banks are not
7 just involved with respect to the bank fraud charges, they are
8 also involved in the sanctions charges because the gravamen of
9 the sanctions charge is bank transactions.

10 They are also involved in the money laundering
11 charges, because the specified unlawful activities that are
12 alleged to have been promoted are the IEEPA violations and the
13 bank fraud violations. So if we are carving out anything
14 having to do with the banks, it is not clear what exactly is
15 left over.

16 And one final complication that we can see from
17 Mr. Gillers' letter is he appears to propose an additional
18 condition. It is not really explicit, but it appears that he
19 is also suggesting sort of an ethical wall within Mr. Zarrab's
20 defense team so that not only would Kirkland & Ellis attorneys
21 not be able to take certain overtly adverse steps, such as
22 cross-examining bank witnesses or advancing arguments about
23 bank wrongdoing, but they would also not be able to participate
24 in those discussions or decisions within the defense team. I
25 think that is a new condition, sort of an internal defense team

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1 wall, that has not previously been put before the Court, and I
2 think that that is another issue that I think the Court has to
3 be confident of in determining what are the factual parameters
4 of the proposed waivers and in what ways could those impact the
5 firm's ability to represent the defendant effectively and to
6 what extent do they reflect valid waivers by the banks.

7 So as I said earlier, we have some additional thoughts
8 sort of generally about this matter, but I think those are the
9 issues that jump out at us particularly with respect to the
10 HSBC representation.

11 THE COURT: As a practical matter, is one thing that
12 you are suggesting that the Curcio questions be revised that
13 are posed to Mr. Zarrab? Would that either illuminate and/or
14 resolve any issues that remain?

15 MR. LOCKARD: There are a couple of ways that these
16 issues play out in the decision that the Court ultimately is
17 going to have to resolve here. One is that, you know, it is
18 the government's view that the nature and scope of the banks'
19 waivers are relevant information for both Mr. Zarrab to
20 consider and for the Court to consider in determining whether
21 Mr. Zarrab's waiver is a knowing and intelligent one. A
22 voluntary waiver is no good if it is not also knowing and
23 intelligent.

24 I think Mr. Zarrab and the Court also have to be
25 confident in the validity of those banks' waivers or to the

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1 extent to which they are subject to uncertainty or revocation
2 later down the line, because if conflict issues are reraised
3 later on in this proceeding it's going to affect the
4 administration of the proceedings from the Court's perspective,
5 it could potentially affect the defendant's trial rights
6 depending on the timing and the nature of those things, so it
7 is in everyone's interest to make sure that we have a lot of
8 transparency here all around.

9 The second way that the bank waivers are relevant to
10 what the Court has to decide is there is this concept in
11 determining whether a conflict is waivable about whether the
12 attorney, if permitted to stay on the in the representation,
13 would be so diminished in their ability to zealously represent
14 their client that it's not really a reasonable thing to waive.
15 I think the Court has to be able to assess, given whatever
16 conditions are being proposed on the representation, would it
17 under those conditions be reasonable for the defendant to waive
18 the conflict and would those conditions have a material impact
19 on the firm's ability to represent the defendant. So those are
20 the two ways that we think that this is relevant to the issue
21 the Court is going to have to decide.

22 THE COURT: And how are those two issues fleshed out
23 further? Is the record adequate? I am going to raise the
24 question again of whether the Curcio questions need revision to
25 illuminate either of these two issues?

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1 MR. LOCKARD: I think the record probably needs more
2 clarity on what really are the scope of the conditions that
3 have been placed on the banks' waivers, what is the scope of
4 the limitations that Mr. Gillers is proposing. You know, for
5 example, one of the things Mr. Gillers says is that Kirkland
6 would be prohibit from taking certain actions that could be
7 harmful to the banks, and one of those says, for example,
8 accusing the banks of wrongdoing. That is an example. What is
9 the full scope of what it is that the firm is not going to be
10 doing and not going to be participating in decisions about and
11 not willing to be sharing information with the other firms and
12 lawyers on the team? What really is the scope of the
13 limitations that the Court is being asked to rely upon in order
14 to determine that the waivers are effective and that Mr. Zarrab
15 has knowingly waived his conflict.

16 MR. BRAFMAN: Your Honor, can I be briefly heard?

17 THE COURT: Yes. I was just going to turn to you,
18 actually, and ask you, as a general matter, since you represent
19 Mr. Zarrab, you know -- this is too simplicit but what do you
20 think of all of this, so to speak, is really what I am asking?

21 MR. BRAFMAN: Judge, I am, you know, pleased that the
22 Court has engaged in this discussion, and clearly the Court has
23 spent a substantial amount of time and effort in trying to
24 resolve this issue. And I also commend Mr. Dinh and his firm
25 for trying their best to accommodate the Court's requests and

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1 furnishing your Honor with as many waivers as is humanly
2 possible.

3 At the end of the day, I think what the Court needs to
4 I think recognize, hopefully, is that this boils down to a
5 question of trust, because regardless of the questions you put
6 to Mr. Zarrah and Mr. Dinh and myself, we in the well of this
7 courtroom on both sides rely on each other's professionalism
8 and integrity. We work with protective orders on both sides,
9 and we assume the parties will act responsibly.

10 This case really has two parts. There was a motions
11 part which has been resolved. After careful review, your Honor
12 has issued its rulings, and right now we are abiding by those
13 rulings in preparing for trial.

14 The issue with respect to the banks, to me, at least,
15 is fairly simple. We want Mr. Dinh and his firm to remain in
16 the case. I think they have demonstrated their scholarship
17 over and over again in very, very complicated and novel issues
18 dealing with IEEPA sanctions. But with respect to the trial
19 itself, they were never contemplated as being part of the trial
20 team that would cross-examine any witnesses but certainly will
21 not be cross-examining bank witnesses. And we do not need
22 their confidential information, should they have any, in order
23 to prepare for the cross-examination of bank witnesses. Much
24 of what is in the HSB case, for example, is a matter of public
25 record. The briefs have been filed. The arguments will be a

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1 part of the public record. And I would never ask or expect
2 Mr. Dinh or his colleagues to divulge any confidential
3 information, nor would we try to obtain it.

4 Whether the banks are victims or not in this case is a
5 question of fact, not really something that we need to address
6 any longer because your Honor has ruled on the bank fraud
7 issue. We reserve the right after the trial is over in the
8 charging conference to revisit those issues depending on the
9 information that we obtain from bank witnesses. But it is
10 either I or Mr. Kirshner or Mr. Ferrari, who has no conflict,
11 who will be questioning bank witnesses.

12 So I think this is a very intelligent, smart, academic
13 exercise that the Court must engage in. I think with the
14 recommendation of Professor Gillers, we have independent
15 counsel as well who has discussed these issues with Mr. Zarrab,
16 as have I, and I think he is prepared to make an intelligent,
17 knowing waiver of today and can respond to all of the Court's
18 questions, and I think that should suffice, most respectfully.

19 THE COURT: Do we have to modify those questions at
20 all further to reflect any of your concerns or comments or
21 Professor Gillers', for that matter?

22 MR. DINH: Your Honor, we asked Professor Gillers to
23 review the questions, and the relevant question is question
24 number 10.

25 THE COURT: In your --

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MR. DINH: In both the original and the revised.

THE COURT: Hold on a second.

(Pause)

MR. BRAFMAN: I agree, your Honor.

MR. DINH: This is exactly -- the operative question is obviously question number 9, which presents the probabilities of the limitation on our representation.

Question number 10 provides elucidation of those specific factual scenarios. And as our submission last night indicated, Professor Gillers recommended, and we propose to the Court, the addition of questions 10(e) and 10(f), and I think that if the Court accepts that, that encapsulates and operationalizes the limitations that Professor Gillers had reviewed and we would accept.

THE COURT: E and F?

MR. DINH: E and F as an addition, yes, your Honor, because A, B, C and D already takes care of all of the possibilities that Mr. Lockard deals with, and then E and F goes one step further in terms of us not even participating outwardly but --

THE COURT: Do you agree?

MR. BRAFMAN: I agree that those are the pertinent questions.

THE COURT: And Mr. Lockard?

MR. LOCKARD: Your Honor, I don't think we get to

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1 question 10 because we still have two of the bank victims who
2 have not waived the conflict. So I understand that it is
3 Mr. Dinh's position that the firm has voluntarily cabined its
4 representation to the point where it is no longer adverse to
5 those two particular victims, but I don't know the answer. I
6 don't know if that is allowable under the rules or if the broad
7 outlines of the representation creating those issues puts the
8 clients in a position where even in the face of the proposed
9 voluntary conditions their waiver is still required.

10 THE COURT: And what is your view with respect to
11 Citibank, which has said that it will not sign a waiver?

12 MR. LOCKARD: If the Court determines that Citibank's
13 waiver is required, then it seems to us that is the end of the
14 inquiry at that point. Then that sort of feeds back into the
15 question of --

16 THE COURT: But didn't you take the position before
17 that there do need to be waivers on both sides, and does that
18 mean all or none? In the case of Citibank, no waiver, no
19 waiver of conflict is possible?

20 MR. LOCKARD: Without having had an opportunity to
21 really research this question, it certainly appears from the
22 face of the rule that Citibank is an affected client. It could
23 be the law that the firm can make them unaffected by imposing,
24 you know, self-imposed conditions on its representation of the
25 other client. It's not obvious to me that that's true.

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1 MR. DINH: Your Honor, may I make a suggestion in the
2 interest of administration, your Honor?

3 THE COURT: OK. Yes.

4 MR. DINH: We have the issues all joined because
5 Citibank has advised that they will not waive.

6 THE COURT: Right.

7 MR. DINH: We have what I believe, and I don't hear
8 any difference, a complete set of Curcio questions. I think
9 that the government --

10 THE COURT: And we are -- you are still pursuing the
11 two waivers that are out?

12 MR. DINH: We are.

13 THE COURT: And they haven't rejected --

14 MR. DINH: Exactly. We are still -- the city has
15 rejected but the Wells Fargo has not. We are still talking
16 with them.

17 The question that Mr. Lockard reserves as an anterior
18 question is really whether or not the sentence that I read to
19 the Court at the beginning in Professor Gillers' opinion is
20 indeed the law and whether or not --

21 THE COURT: That's what I was just going to ask.

22 MR. DINH: Exactly. Whether or not the bank waivers
23 are relevant. Professor Gillers' opinion, our position is they
24 are not because there is nothing to waive.

25 What I suggest, what I propose, that we proceed with

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1 the Curcio portion of this and reserve for your Honor's
2 decision -- and perhaps Mr. Lockard would suggest additional
3 briefing is required -- that legal question whether or not it
4 is adequate. At least then we could have a full record as to
5 Mr. Zarrab's waiver in light -- but still reserve in light of
6 the Citibank nonwaiver and then reserve the question of law
7 that Mr. Lockard wants further research on that seems to divide
8 the parties.

9 MR. LOCKARD: I think there are still two at least
10 open factual issues. One is the Wells Fargo, who has been
11 requested to waive, we understand, but has not yet. It could
12 be that Wells Fargo also declines to waive. It could be that
13 they agree to waive but impose additional conditions that would
14 be new facts the Court would have to consider and new facts for
15 Mr. Zarrab to have to consider. So we think that that is an
16 issue that in the interest of efficiency probably should be
17 resolved first.

18 We think there is also an open factual question --

19 THE COURT: You think that Mr. Zarrab ought to know
20 whether or not there is going to be a Wells Fargo waiver and,
21 if there is, what it says before he can respond to these
22 questions?

23 MR. LOCKARD: I think so. You can imagine -- it seems
24 unlikely, but Wells Fargo could say that we waive -- we want to
25 sit in on defense strategy meetings. I don't think they would

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1 do that but we don't know until we have the waiver.

2 THE COURT: I understand.

3 Was there something else?

4 MR. LOCKARD: There was another one and this loops
5 back to an issue that was raised at the prior conference. So
6 there had been a discussion about the process by which the
7 waivers had been obtained. We alerted the Court to the fact
8 that with respect to these banks the government has been in
9 contact with certain portions of the bank for purposes of
10 obtaining documents relating to the investigation and trial
11 preparation, identifying trial witnesses, and beginning to
12 prepare topics of trial testimony and trial testimony. Those
13 individuals as of November 30th appear not to have had any
14 substantive discussions with the portions of the bank counsel
15 who had been considering the requests to waive the conflict.

16 So since then, the same two waivers that had already
17 been issued before that discussion on the record on
18 November 30th had been resubmitted to the Court. I don't know,
19 maybe Mr. Dinh can answer the question, whether the bank
20 internal conversations have now taken place and the banks'
21 counsel reaffirms the waivers after having had that substantive
22 discussion. I think the Court's concern had been that if the
23 people considering the waiver were not in touch with the people
24 actually affected by participating in the investigation and
25 preparing for trial testimony, if they weren't talking to each

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1 other the waivers could be illusory because the banks may not
2 be fully informed about the scope of the factual or legal
3 issues presented.

4 MR. DINH: I appreciate Mr. Lockard's--

5 MR. LOCKARD: I am not quite finished. I have just a
6 little bit more to lay out so that Mr. Dinh can maybe address
7 all of these issues at once.

8 Following the conference, we provided contact
9 information to defense counsel for the individuals with whom we
10 had been in touch. We provided those individuals with copies
11 of the public filings relating to the Curcio issue and the
12 transcript of the November 30th conference in an effort to try
13 and fulfill the Court's desire that the banks have internal
14 discussions to make the waivers effective and valid. We do not
15 know if those people spoke to the individuals who considered
16 the waivers and signed the waivers.

17 We asked defense counsel to provide us with the names
18 of the individuals with whom they were speaking so that we
19 could provide that contact information to the individuals at
20 the bank that we had been in touch with, but we were not
21 provided that information until after the waivers were signed
22 and filed. We did see that the waivers were then provided to
23 the individuals we had identified but it did not appear --

24 THE COURT: Say that again.

25 MR. LOCKARD: Defense counsel then provided the

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1 individuals at the banks with whom the government had been
2 communicating with copies of the executed waivers, but it
3 wasn't apparent that the discussions between the two groups of
4 people at the banks had occurred before the waivers were
5 signed. And maybe Mr. Dinh is in a position to represent to
6 the Court whether those discussions did or did not happen, but
7 we think that that is an open factual issue that the Court
8 already has expressed a deep interest in and should be
9 resolved.

10 MR. DINH: I think the operative question here is
11 whether or not those waivers are illusory, and we have taken
12 steps and procedures in order to ensure that every part of the
13 left hand knows what the right hand is doing. We copied
14 Mr. Lockard on those transmittal emails. No bank has expressed
15 anything other than thank you to us for providing that
16 information.

17 THE COURT: So you are representing to the Court that
18 the waivers speak for the bank?

19 MR. DINH: Yes, your Honor.

20 THE COURT: For the entire bank?

21 MR. DINH: Because we have provided those executed
22 waivers to the parts of the bank that Mr. Lockard has been in
23 communication with, and we have received no contrary indication
24 that there was want of authority or that there were further
25 revisions to be had. Yes, your Honor.

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1 THE COURT: So the waivers are as if they were issued
2 by the chairman of the bank, as it were, and binds the whole
3 bank?

4 MR. DINH: That is correct.

5 THE COURT: Whether somebody had spoken to somebody
6 else as a factual matter, the entire bank is bound by those
7 waivers?

8 MR. DINH: That is our understanding, especially given
9 your Honor's instruction to ensure the identified individuals
10 and the lines of authority within the bank, and we have taken
11 all the steps necessary to inform the other parts of the bank
12 that Mr. Lockard refers to, and there has been no contrary
13 indication. Yes, your Honor.

14 MR. LOCKARD: Your Honor, I don't think that answers
15 the question. I don't think there has ever been any dispute
16 that the bank counsel executing the waivers had the authority
17 to do so.

18 I think the concern that the Court expressed quite
19 pointedly was that if parts of the bank have material
20 information about the investigation or about the case that are
21 not being communicated to the decision makers, it undermines
22 the Court's confidence in those waivers. Waivers are
23 revocable. If banks become aware of information that they wish
24 they had known later on, this issue could come back up again
25 later on in the proceedings. And so saying that the signed

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1 waivers were presented to the knowledgeable part of the bank
2 after they had been executed I don't think addresses the
3 Court's concern at all.

4 MR. DINH: I think the concession that the question is
5 not one of legal authority to bind the bank answers your
6 Honor's question. There was additional concern that they are
7 somehow illusory, but those concerns are adequately addressed
8 by the full and frank appraisal of those waivers and decisions
9 to the relevant parts of the bank. And I think that no further
10 intrusion into the bank's deliberative processes or our
11 attorney-client relationship with the bank is necessary in
12 order to ensure the defendant's rights in this case.

13 THE COURT: And when did you anticipate that you will
14 hear from -- Wells Fargo then is the only outstanding --

15 MR. DINH: Yes, your Honor, Wells Fargo is the only
16 outstanding waiver that is out there.

17 THE COURT: And one way or another, you would know
18 when, whether it is forthcoming or --

19 MR. DINH: Yeah. We were hoping to get it done before
20 today, but we anticipate probably within the next 48 hours is
21 my guess, probably. Again, I am not in charge of the timing
22 and I can't push a string, but we are working as diligently as
23 possible to provide the Court with the information.

24 THE COURT: OK. All right.

25 Anybody else?

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(Pause)

So we will take a short break of about five or ten minutes.

(Recess)

THE COURT: Please be seated.

So here's what I'd like to do. In the interest of perhaps consistency, I do want to hold off asking the Curcio questions until we get the Wells Fargo response. I am happy to call you back whenever that comes in. If it comes in in a day or so, I can do it Tuesday morning at 10, if that is agreeable to all of you, or if it doesn't come by then, I will do it as soon as it comes in. It seems to me that if we're developing a record, we might as well have the full record, even though there is this just one item outstanding.

And even though we can assume, I suppose, or you are assuming that the answers to the questions that have been presented to the Court probably would not change one way or another if that bank decided not to waive or it had some different conditions, but, nevertheless, it doesn't make sense to not have a full record. Let's have a full record.

But in the meantime, I would like you to prepare, both the government and the defense, for simultaneous submission of findings of fact and conclusions of law with respect to -- with authorities -- with respect to this Curcio issue. And as to that, I'm going to go off the record and you can talk among

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1 yourselves as to what's a reasonable period of time that you
2 would like to have to make those submissions. I will be at
3 your disposal.

4 I think that they can be simultaneous submissions. I
5 think each side knows everything that everybody else knows.
6 And so you tell me what are good dates for you for that so we
7 don't hold up the process.

8 And with those findings of fact and conclusions of
9 law, if you would submit a proposed form of judgment also, a
10 short form, that you propose that the Court sign that covers
11 your position.

12 MR. DINH: Your Honor, we would propose one week from
13 today.

14 THE COURT: That is fine.

15 Is that OK with you?

16 MR. LOCKARD: I think that's fine. One potential
17 wrinkle is if we don't get the last waiver of the bank's
18 position until --

19 THE COURT: Well, that is understood. I think that is
20 understood. I say that's fine. Let me just take a look.

21 (Pause)

22 All right. So let's tentatively set 12/20 at 10.
23 That presumes that the Wells Fargo issue is in hand for the Q&A
24 part of Curcio.

25 Is that all right with -- Mr. Brafman, is that OK with

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1 you? The 20th at 10 works?

2 MR. BRAFMAN: I'm sorry?

3 THE COURT: The 20th at 10 works for you?

4 MR. BRAFMAN: Give me one second, sir.

5 THE COURT: OK.

6 (Pause)

7 MR. BRAFMAN: Yes, your Honor.

8 MR. DINH: Yes, your Honor.

9 THE COURT: OK. And so could the government -- then
10 we'll say 12/21 for the submission of the findings of fact,
11 conclusions of law. I'm interested in all of the issues that
12 we have been discussing, but in your findings of fact,
13 conclusions of law, I am most interested in the question that's
14 discussed in Professor Gillers' opinion, that no waivers are
15 needed on the bank side at all, and I'm also interested in what
16 you all believe is the impact of the HSBC matter to this Curcio
17 proceeding.

18 MR. BRAFMAN: Your Honor, is the 20th at 10 subject to
19 us having the information from the bank?

20 THE COURT: Yes. And if you don't, you will let me
21 know and I will make it at another time.

22 MR. BRAFMAN: Yes. Thank you, your Honor. We will be
23 in touch with the Court.

24 THE COURT: So I will grant the applications of
25 Ms. Chung and Mr. Kleinfeld to exit the case, with our thanks

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1 for your participation, and Mr. Ferrari of entering into the
2 case. Thanks to you as well.

3 MR. FERRARI: Thank you, your Honor.

4 THE COURT: Any other issues that we need to address?

5 MR. RIMM: Would your Honor like me here next Tuesday?

6 THE COURT: Yes. Absolutely. For whenever we do the
7 Q&A, I think having you here would be very desirable.

8 OK? Anything else?

9 MR. LOCKARD: Not from the government.

10 THE COURT: Nope? Thanks very much.

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